2013 IL App (4th) 120659-U

NO. 4-12-0659

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 27, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
CLYDE H. WALLACE,	)	No. 11CF726
Defendant-Appellant.	)	
	)	Honorable
	)	Steven H. Nardulli,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant was attempting to raise an affirmative defense to aggravated battery not recognized by Illinois law, the trial court properly answered in the negative the jury's question regarding its ability to consider the defendant's reasoning for striking the victim.

¶ 2 Where the trial court declined to impose any fines, the circuit clerk's imposition of fines against defendant must be vacated, and the cause remanded for the trial court to impose all applicable mandatory fines and fees.

¶ 3 In August 2011, a grand jury indicted defendant, Clyde H. Wallace, with one count of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010) (text of statute effective until July 1, 2011)). After a May 2012 trial, a jury found defendant guilty of aggravated battery. Defendant filed a posttrial motion and an amended posttrial motion, challenging, *inter alia*, the Sangamon County circuit court's answer to one of the jury's questions. At a joint hearing in July 2013, the court denied defendant's amended posttrial motion, sentenced defendant to 42 months'

imprisonment, and ordered him to only pay court costs.

¶ 4 Defendant appeals, arguing (1) the trial court's response to one of the jury's questions was erroneous because it directed a verdict against defendant and (2) the circuit clerk improperly assessed fines against defendant. We affirm in part, vacate in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 The August 2011 grand jury indictment alleged that, on June 5, 2011, defendant knowingly made contact of an insulting or provoking nature to Jordan Monroe in that he struck Monroe about his head and/or body while Monroe was at the Sangamon County jail.

¶ 7 In March 2012, defendant filed two notices of an affirmative defense, raising the defenses of use of force in defense of person (720 ILCS 5/7-1 (West 2010)) and necessity (720 ILCS 5/7-13 (West 2010)). Defendant also filed a proffer of evidence pursuant to *People v. Lynch*, 104 Ill. 2d 194, 200, 470 N.E.2d 1018, 1020 (1984), seeking to introduce evidence showing Monroe's propensity for aggression and violent acts. In May 2012, the State filed a motion *in limine*, seeking to exclude any reference to *Lynch* material. At a May 2012 pretrial conference, the trial court addressed the issue of the admissibility of the *Lynch* material and heard defendant's testimony that was to be the foundation in support of his affirmative defenses. Defendant testified that on June 5, 2011, Monroe had threatened to "shank" defendant for getting involved in Monroe's card game. Defendant believed Monroe to be a dangerous person and was aware of prior episodes of violence by Monroe against other inmates. Defendant was also aware a "shank" was found in Monroe's cell and Monroe got caught sliding a "shank" under another inmate's door. Defendant was also present in the Morgan County jail when Monroe got caught

hiding a razor in the shower. Defendant believed Monroe would stab him when the doors to the cells opened. He felt his life was in danger, and he did not have an opportunity to inform an officer about the threats before the physical altercation. Defendant stated he struck Monroe to get an officer's attention in a manner that would result in their separation. Defendant did admit he was not aware of Monroe actually "shanking" someone and had not seen Monroe with a "shank" on the day of the incident. After hearing the parties' arguments, the trial court granted the State's motion *in limine* to bar the use of *Lynch* material, noting defendant could not have reasonably believed he was in danger.

¶ 8 On May 15, 2012, the trial court commenced defendant's jury trial. The following is the evidence presented at trial related to the issues on appeal. Monroe testified that, on June 5, 2011, he was in the O block of the Sangamon County jail. The inmates in the jail must be out of their cells and in a dayroom from 8 a.m. to 2 p.m. and again from 4 p.m. to 10 p.m. At around 11:45 a.m., Monroe was in the dayroom playing cards with three other individuals. Monroe asked the two people on the opposing team to stop picking up cards when James Hughes, Monroe's partner, was not looking and noted it was cheating. Thereafter, defendant, who was sitting at another table, told one of the opposing team members, "Don't play cards with that goofy white boy." Monroe asked defendant not to intervene in the conversation. The game ended when Hughes stood up and noted it was not worth playing if the opposing team was going to cheat. Defendant started talking to Hughes and also told him that Monroe was "a goofy white boy." Hughes and defendant exchanged words, and Hughes walked away from the table.

¶ 9 Eventually, Monroe went to the back of the dayroom, and defendant had a few words with him. According to Monroe, defendant stated he was going to enter Monroe's cell

when the doors opened at 2 p.m. and beat Monroe. Monroe told defendant he was the one that started it. Monroe then went and sat at a different table from the card game and began talking to the others at the table. Monroe saw defendant walk to the area in front of defendant's cell, put on his shoes, and tuck his pants into his socks. While Monroe was sitting at the table, defendant ran up behind him and hit Monroe in the head as hard as he could. Monroe did not hear defendant coming and fell in between two chairs. Defendant punched Monroe in the head two more times. Other inmates pulled defendant off Monroe, and defendant tried to kick Monroe in the head as the other inmates pulled defendant away. The control room officer then announced a "lockdown" and opened the cell doors. The inmates were to go into their cells and lock the door. Several correctional officers entered the dayroom. Monroe was taken to the hospital with a head injury. The State played the jail's visual recording of the incident.

¶ 10 On cross-examination, Monroe denied the card game ended because he and Hughes had been accused of cheating. Monroe also denied both being angry at defendant for breaking up the card game and threatening to "shank" defendant. Monroe also indicated he did not fight. At that point, defense counsel requested to introduce the *Lynch* material to show Monroe had been in five or six jail fights. The trial court noted the incident report did not indicate Monroe was fighting. The court denied defense counsel's request, noting its concern the jury would confuse credibility with conduct testimony.

¶ 11 Defendant testified on his own behalf. According to defendant, the opposing team members accused Monroe and Hughes of cheating. Defendant stated tempers were flaring, and he advised Isaac Lee, one of the opposing team members, to remove himself from the situation. Lee then left the game. Monroe got upset with defendant for getting into his business. Monroe

was visibly upset and told defendant he was going to "shank" him when the cell doors opened to teach defendant to mind his own business. Defendant believed the threat was credible and noted Monroe was a very violent inmate. Defendant testified Monroe continued to speak to him as Monroe walked around the dayroom. Defendant believed Monroe was trying to intimidate him. Defendant feared imminent death or great bodily harm by Monroe. Defendant considered knocking on the window to get a correctional officer's attention but feared that would spur Monroe into action. Defendant decided to create a scene that would alert the correctional officers.

¶ 12 Defendant testified he came up from behind Monroe and attacked him. Defendant admitted he "blindsided" Monroe and punched him from the side. However, defendant denied intending to provoke or insult Monroe. Defendant's intent was to alert the officers without suffering a severe injury. When the officers arrived and spoke to defendant, defendant told them he acted in self-defense. On cross-examination, defendant admitted he did not see Monroe with a "shank." He also admitted he could have knocked on the window or thrown a tray against the wall to get the attention of a correctional officer.

¶ 13 At the end of closing arguments, the trial court read the jury instructions, which did not include any affirmative-defense instructions. During jury deliberations, the jury sent five notes to the court. First, the jury asked the following: "Are we allowed/directed to consider the theory of self-defense for reasonable doubt?" The court answered, "You are directed to read the instructions as provided to you." The second question asked: "Should we consider intent of provoking or insulting nature [?] (Instructions) statute seem to say not[.]" The court responded, "No." The third note was a request to watch the recording of the fight again. In the fourth note,

the jury raised the following concern: "If we believe [defendant]'s concern of threat causes him to create an intervention, is that acceptable as a consideration for reasonable doubt?" (Underlining in original.) The court again answered "No," despite defense counsel requesting the jury be instructed to refer to the instructions given to it. Last, the jury presented the following question: "Can notion of 'insulting or provoking nature' be affected legally by testimony of witness, i.e. threat allegedly felt by [defendant]." On this question, the court responded, "Consider the evidence as you heard it in light of the instructions you were given."

¶ 14 Sixteen minutes after the trial court answered the jury's fourth and fifth notes, the jury found defendant guilty of aggravated battery. Defendant filed a motion for a new trial and an amended motion for a new trial, asserting, *inter alia*, the trial court's answer of "no" to the question raised in the jury's fourth note was improper and directed a guilty verdict. Defendant argued the answer would be "yes" if the jury believed defendant's intervention was not tantamount to contact of an insulting or provoking nature, and thus the court should have told the jury to consider the evidence it heard in light of the jury instructions it received.

¶ 15 At a July 13, 2012, hearing, the trial court denied defendant's amended posttrial motion, noting that, if it accepted defendant's argument about the question in the fourth note, it would be creating a new defense as well as making legitimate a jury nullification argument based on factors outside the law. After denying defendant's motion, the court sentenced defendant to 42 months' imprisonment and ordered him to pay costs as assessed by the circuit clerk. The court then noted no other fines in addition to costs would be imposed. On the same day as sentencing, defendant filed his timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Illinois Supreme Court

Rule 603 (eff. Oct. 1, 2010).

¶ 16 II. ANALYSIS

¶ 17 A. Jury Question

¶ 18 In this case, the jury asked several questions. Defendant challenges the trial court's answer of "no" to the following question: "If we believe [defendant]'s concern of threat causing him to create an intervention, is that acceptable as a consideration for reasonable doubt?" (Underlining in original.) Specifically, defendant argues the question is ambiguous and should not have been answered. The State asserts defendant has forfeited his argument because, in the trial court, he asserted the question should be answered in the affirmative. It also argues the court's answer was proper. Since our supreme court has instructed us to begin our review of a case by determining whether any issues have been forfeited (see *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008)), we first address the State's forfeiture argument.

¶ 19 In the trial court, defense counsel began by asserting the answer should be "yes" but then said he would wait to fully respond. When defense counsel again made his argument, he asserted the court should refer the jurors to the instructions because it does not necessarily mean that if defendant created an intervention, then he knowingly made a contact of an insulting or provoking nature. In his amended posttrial motion, defendant argued the proper response was to tell the jurors to "consider the evidence you heard in light of the instructions that were given to you." Based on the aforementioned facts, we disagree with the State defendant argued in the trial court the question should be answered in the affirmative, and thus we find defendant has not forfeited this argument.

¶ 20 Illinois reviewing courts employ a two-step analysis in determining the propriety

of the trial court's response to a jury question. *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 27, 964 N.E.2d 1174. First, we consider whether the trial court should have answered the jury's question, which we review under the abuse-of-discretion standard. *McSwain*, 2012 IL App (4th) 100619, ¶ 27, 964 N.E.2d 1174. A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable or where no reasonable person would agree with the court's position. *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010). Second, we determine whether the trial court's response to the question was correct, which is a question of law reviewed under the *de novo* standard. *McSwain*, 2012 IL App (4th) 100619, ¶ 27, 964 N.E.2d 1174.

¶ 21 As to the first step, we note " '[j]urors are entitled to have their questions answered.' " *McSwain*, 2012 IL App (4th) 100619, ¶ 26, 964 N.E.2d 1174 (quoting *People v. Reid*, 136 Ill. 2d 27, 39, 554 N.E.2d 174, 179 (1990)). Generally, " 'the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of the law arising from facts about which there is doubt or confusion. [Citation.] This is true even though the jury was properly instructed originally. [Citation.] When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy [citations].' " *McSwain*, 2012 IL App (4th) 100619, ¶ 26, 964 N.E.2d 1174 (quoting *People v. Childs*, 159 Ill. 2d 217, 229, 636 N.E.2d 534, 539 (1994)). However, a court can exercise its discretion and decline to answer a jury question under the following circumstances:

> " 'when the jury instructions are readily understandable and sufficiently explain the relevant law, when additional instructions would serve no useful purpose or may potentially mislead the jury, when the jury's request involves a question of fact, or when giving

an answer would cause the trial court to express an opinion likely directing a verdict one way or the other.' " *McSwain*, 2012 IL App (4th) 100619, ¶ 26, 964 N.E.2d 1174 (quoting *People v. Averett*, 237 Ill. 2d 1, 24, 927 N.E.2d 1191, 1204 (2010)).

¶ 22 Defendant argues the trial court's "no" response to the jury's question cut off his defense theory he intended to get the correctional officer's attention by striking Monroe and did not intend to provoke or insult Monroe. Specifically, he contends his reasoning for striking Monroe is part of the factual context in which the striking occurred. The State asserts defendant's defense was not a viable one as a preemptive-strike defense does not exist under Illinois law. We agree with the State.

¶ 23 A person commits the offense of aggravated battery when (1) he knowingly and without legal justification by any means makes physical contact with an individual, (2) the individual is on public property, and (3) the physical contact is of an insulting or provoking nature. 720 ILCS 5/12-3(a)(2), 12-4(b)(8) (West 2010) (text of statute effective until July 1, 2011). Thus, the *actus reus* is the person's "mak[ing] physical contact of an insulting or provoking nature with an individual," and the *mens rea* is the offender performed the *actus reus* knowingly or intentionally. *People v. Robinson*, 379 Ill. App. 3d 679, 684, 883 N.E.2d 529, 534 (2008) (quoting 720 ILCS 5/12-3(a)(2) (West 2004)). No additional special mental element is required. *Robinson*, 379 Ill. App. 3d at 684, 883 N.E.2d at 534. Here, defendant admitted he intentionally and knowingly struck Monroe. Moreover, the State did not have to prove a lack of legal justification as it is not a necessary element of the offense of battery. *People v. Sambo*, 197 Ill. App. 3d 574, 582, 554 N.E.2d 1080, 1085 (1990). Additionally, the jury did not receive any

instructions on an affirmative defense. Thus, defendant's reasoning for striking Monroe was not relevant to the *mens rea* element or an affirmative defense.

¶ 24 Defendant contends his intent is relevant to determine whether his striking was insulting or provoking because it is part of the context in which the contact occurred. In support of his argument he cites *People v. Peck*, 260 Ill. App. 3d 812, 814, 633 N.E.2d 222, 223 (1994), and *People v. d'Avis*, 250 Ill. App. 3d 649, 651, 621 N.E.2d 206, 207 (1993), where the defendants argued their actions did not result in an insulting or provoking contact. The *Peck* court cited the holding in *d'Avis* that " 'a particular physical contact may be deemed insulting or provoking based upon the factual context in which it occurs.' " *Peck*, 260 Ill. App. 3d at 814, 633 N.E.2d at 223 (quoting *d'Avis*, 250 Ill. App. 3d at 651, 621 N.E.2d at 207).

> "In *d'Avis*, the defendant, a medical doctor, was convicted of battery of an insulting or provoking nature for masturbating while performing a rectal examination on a patient. *** The appellate court affirmed the defendant's conviction, holding that his otherwise noninsulting act (the consensual rectal examination) became an insulting or provoking contact when viewed in context (the concurrent masturbation)." *Peck*, 260 Ill. App. 3d at 814, 633 N.E.2d at 223-24 (citing *d'Avis*, 250 Ill. App. 3d at 651, 621 N.E.2d at 208).

The *Peck* court found the case before it was logically similar and concluded that, while it could envision contexts in which a defendant's spitting might not be insulting or provoking contact, the defendant's spitting in the police officer's face clearly amounted to insulting or provoking contact.

Peck, 260 Ill. App. 3d at 814-15, 633 N.E.2d at 224.

¶ 25 Neither of the cases defendant cites discussed the defendant's intent for committing the contact in discussing the context of that contact. The *d'Avis* opinion referred to another act that was ongoing (masturbation), and the *Peck* decision did not explain what contexts it could envision that would render spitting not insulting or provoking. The determination of whether the contact was insulting or provoking requires an analysis of the contact, the *actus reus* of battery. Thus, the context of the contact is what was going on at the time of the contact. A defendant's reasoning for making contact with a person is irrelevant to assessing the *actus reus* of battery. See *People v. Clay*, 165 Ill. App. 3d 68, 70, 518 N.E.2d 659, 661 (1987) (noting that,"[i]f one strikes another causing bodily harm because of an unreasonable but actual belief that the force is necessary, a battery is nevertheless committed"). Accordingly, we agree with the State and the trial court that defendant was attempting to raise an affirmative defense of striking someone to prevent some perceived future attack on himself, a defense that does not exist under Illinois law. Thus, we find both the trial court did not abuse its discretion by answering the jury's question and the court's answer was proper.

¶ 26 B. Fines

¶ 27 Defendant argues this court should strike the fines imposed in this case because they must have been imposed by the circuit clerk, as the trial court expressly imposed no fines. The State agrees with defendant and concedes the issue.

¶ 28 We strongly agree with the parties the circuit clerk's imposition of the fines was improper and note such actions by the clerk flagrantly run contrary to the law. See *People v. Williams*, 2013 IL App (4th) 120313, ¶ 16, 991 N.E.2d 914. Accordingly, we vacate the fines

imposed by the circuit clerk. However, that does not end the matter.

¶ 29 When a fine is statutorily mandated, a trial court does not have the authority to decline to impose it. See *People v. Montiel*, 365 Ill. App. 3d 601, 606, 851 N.E.2d 725, 728 (2006) (holding the defendant's sentence was void to the extent it did not include mandatory fines and fees). Accordingly, we remand the cause with directions for the trial court to impose the mandatory fines and fees as required at the time of the offense, which was June 5, 2011. In doing so, we encourage the trial court to review the reference sheet this court recently provided in *Williams*, 2013 IL App (4th) 120313, 991 N.E.2d 914, to assist the trial courts in ensuring the statutory fines and fees in criminal cases are properly imposed. After the mandatory fines and fees are properly imposed, defendant then should receive credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)) against his fines that allow such credit. See *Williams*, 2013 IL App (4th) 120313, 991 N.E.2d 914 (containing a reference sheet that notes what fines can receive credit under section 110-14(a)).

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we vacate the fines imposed by the circuit clerk, affirm the judgment in all other respects, and remand the cause to the Sangamon County circuit court for an amended sentencing judgment consistent with this order. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed in part and vacated in part; cause remanded with directions.